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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MAY 11, 2001

PETITION OF

CASE NO. PUC970029

PAYTEL COMMUNICATIONS, INC.,  
PEOPLES TELEPHONE COMPANY, INC., and  
PHON TEL TECHNOLOGIES, INC.,

For rejection of and investigation  
of tariffs filed by Virginia local  
exchange carriers pursuant to  
§ 276 of the Telecommunications  
Act of 1996

FINAL ORDER

On March 21, 1997, PayTel Communications, Inc. ("PayTel"), Peoples Telephone Company ("Peoples Telephone"), Phon Tel Technologies, Inc. ("Phone Tel"), and Communications Central, Inc. ("Communications Central"),<sup>1</sup> (collectively, the "Payphone Service Providers" or "PSPs") filed with the State Corporation Commission ("Commission") their Motion to reject tariffs filed by certain named Virginia incumbent local exchange companies ("ILECs")<sup>2</sup> and Petition asking the Commission to investigate, determine, and establish cost-based rates for basic payphone

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<sup>1</sup> Communications Central withdrew from this proceeding on April 24, 1998, and requested that its name be removed from the caption.

<sup>2</sup> The Motion and Petition specifically addressed proposed payphone tariffs filed by Bell Atlantic-Virginia, Inc. n/k/a Verizon Virginia Inc. ("Verizon Virginia"), GTE South Incorporated n/k/a Verizon South Inc. ("Verizon South"), United Telephone-Southeast, Inc. ("United"), and Central Telephone Company of Virginia ("Centel"). Proposed payphone tariffs also were filed by Clifton Forge-Waynesboro Telephone Company n/k/a NTELOS ("NTELOS") and TDS

services ("Motion to Reject and Petition"). The tariffs were filed by the ILECs pursuant to § 276 of the Telecommunications Act of 1996 (the "Act")<sup>3</sup> and pursuant to implementing orders of the Federal Communications Commission ("FCC").<sup>4</sup>

Section 276 of the Act required the FCC to "establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed intrastate and interstate call using their payphone . . .".<sup>5</sup> Section 276 of the Act also prohibited a Bell operating company ("BOC") from subsidizing its payphone operations with its telephone exchange service or exchange access operations and prohibited discrimination in favor of the BOC's payphone service.<sup>6</sup> In addition, § 276 of the Act directed the FCC to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments . . . and all intrastate and interstate

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subsidiaries, Amelia Telephone Company ("Amelia"), New Castle Telephone Company ("New Castle"), and Virginia Telephone Company.

<sup>3</sup> 47 U.S.C. § 276.

<sup>4</sup> Implementation of the Pay Phone Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541 (1996) (hereafter "Report and Order"); and Order on Reconsideration, 11 F.C.C.R. 21233 (1996) (hereafter "Order on Reconsideration"), aff'd in part and remanded in part, sub nom. Illinois Public Telecommunications Assn. v. F.C.C., 117 F.3d 555 (D.C. Cir. 1997). The FCC issued its Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 F.C.C.R. 2545 (1999), to reestablish how PSPs should be compensated for "dial around" calls, following the court's supplemental opinion, clarifying the portions of the FCC's Report and Order and Order on Reconsideration that were vacated. 123 F.3d 693 (D.C. Cir. 1997).

<sup>5</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>6</sup> 47 U.S.C. § 276(a).

payphone subsidies from basic exchange and exchange access revenues . . . [and to] prescribe a set of nonstructural safeguards for [BOC] payphone service . . .".<sup>7</sup>

In its Report and Order released September 20, 1996, and Order on Reconsideration released November 8, 1996, the FCC adopted regulatory requirements for the payphone industry to implement § 276 of the Act. Among other things, the Report and Order and Order on Reconsideration directed LECs to file intrastate tariffs for basic payphone lines used for basic payphone services. Such tariffs were required to be: (1) market based, (2) nondiscriminatory, and (3) consistent with the requirements of § 276 of the Act.<sup>8</sup>

On March 28, 1997, the Commission issued its Order Authorizing Interim Rates and Initiating Investigation. Among other things, the proposed payphone tariffs of Verizon Virginia, Verizon South, United, Centel, NTELOS, New Castle, and Virginia Telephone Company were ordered to take effect subject to investigation and refund if the Commission ultimately determined that different rates were to be imposed. The Commission's Order of March 28, 1997, also cautioned that by allowing the proposed

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<sup>7</sup> 47 U.S.C. § 276(b)(1)(B), (C).

<sup>8</sup> See Order on Reconsideration at Paragraph 163. The FCC later issued an order clarifying that the intrastate tariffs must satisfy the requirements applied to new interstate access services proposed by incumbent LECs subject to price cap regulation, the so-called new services test of the Computer III tariffing guidelines. Implementation of the Pay Phone Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 12 F.C.C.R. 21370 (1997).

tariffs to take effect, it was not indicating or implying that these tariffs were determined to be in compliance with § 276 of the Act or with the FCC's Report and Order and Order on Reconsideration.

Subsequent to the Commission's March 28, 1997, Order, the Commission joined other state regulatory commissions and the National Association of the State Utility Consumer Advocates ("NASUCA") in seeking review of a portion of the FCC's Report and Order and Order on Reconsideration. The state regulatory commissions and NASUCA argued on appeal that the Act did not give the FCC authority to preempt the states' power to regulate local coin rates.<sup>9</sup>

The Court of Appeals for the District of Columbia Circuit held that the Act did authorize the FCC to set local coin rates for payphones.<sup>10</sup> The Court of Appeals stated that when Congress directed the FCC to ensure that PSPs were fairly compensated for each and every completed intrastate and interstate call, it did not intend to exclude local coin rates from the term "compensation." Rather, the term "compensation" was intended to encompass rates paid by callers in the form of coins deposited into phones.<sup>11</sup> Therefore, according to the Court of Appeals,

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<sup>9</sup> Illinois Public Telecommunications Ass'n. v. F.C.C., 117 F.3d 555, 561 (D.C. Cir. 1997), decision clarified on reh'g, 123 F.3d 693 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998).

<sup>10</sup> Id. at 562.

<sup>11</sup> Id.

§ 276 of the Act unambiguously granted the FCC the authority to regulate local coin call rates. The FCC chose to ensure that PSPs were "fairly compensated" by completely deregulating the rates, allowing PSPs to establish rates at the price the market would bear for such local calls.

In sum, by virtue of the Act, the FCC has directly preempted the Commission's historic authority over local coin call rates as well as certain other intrastate payphone rates and services. This preemption, therefore, means that the Commission cannot investigate the proposed intrastate tariffs independent of the FCC's Report and Order and Order on Reconsideration. The FCC regulations attempt to place significant regulatory responsibilities on state commissions, including this Commission. In this case, the FCC regulations, among other things, would require us to evaluate the proposed intrastate tariffs for compliance with FCC regulations regardless of whether they are consistent with this Commission's rules and practices.<sup>12</sup> We find this an awkward, if not an unworkable, prospect. These responsibilities delegated by the FCC attempt to impose upon the Commonwealth, in its sovereign capacity, a role pursuant to § 276 of the Act that is in

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<sup>12</sup> On November 24, 1993, the Commission adopted Regulations for Pay Telephone Service and Instruments ("Pay Telephone Rules") pursuant to Va. Code §§ 56-508.15 and 56-508.16 (20 VAC 5-400-90). Among other requirements, these rules established the pricing requirements for local exchange carriers' payphone access lines. In addition, the pricing of Basic Local Exchange Services (including payphone lines) of Verizon Virginia, Verizon South, United, and Centel are controlled by the Alternative Regulatory Plans for these companies approved by this Commission.

violation of the Tenth Amendment. The Tenth Amendment has been broadly interpreted to prohibit the federal government from compelling states or state officials to implement federal regulatory programs through state actions.<sup>13</sup> Moreover, the Commission can only act as authorized by the Constitution of Virginia and state statute.<sup>14</sup> Its jurisdiction must be found either in constitutional grants or in statutes that do not contravene the Constitution of Virginia.<sup>15</sup> The Commission does not have the authority independent of our Constitution and state statutes to strictly assist the FCC in fulfilling the FCC's statutory and regulatory duties.

The FCC's Order on Reconsideration provides that:

States unable to review these tariffs may require the LECs operating in their state to file these tariffs with the [FCC] Commission. (para. 163)

The FCC retains jurisdiction under § 276 of the Act "to ensure that all requirements of section 276 and the Payphone Reclassification Proceeding are met."<sup>16</sup> That being so, we decline to assist the FCC further in this instance.

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<sup>13</sup> See New York v. United States, 505 U.S. 144; 112 S. Ct. 2408 (1992); Printz v. United States, 521 U.S. 898; 117 S. Ct. 2365 (1997).

<sup>14</sup> Va. Const. art. IX, § 2.

<sup>15</sup> City of Norfolk v. Virginia Electric and Power Company, 197 Va. 505; 90 S.E.2d 140 (1955).

<sup>16</sup> In the Matter of Wisconsin Public Service Commission Order Directing Filings, CCB/CPD Docket No. 00-1, DAOO-347, 15 F.C.C.R. 9978 (2000).

THEREFORE, upon consideration of this matter, the Commission finds that the proposed payphone tariffs filed with this Commission shall for the present time remain in effect. However, any party may directly request the FCC to require the ILECs to file payphone tariffs with the FCC which comply with § 276 of the Act.

The Commission declines to further investigate the proposed payphone tariffs and dismisses this docketed proceeding without prejudice.

Accordingly, IT IS ORDERED THAT this matter is DISMISSED and, there being nothing further to come before the Commission, the papers filed herein shall be placed in the file for ended causes.